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15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**

17 ANIKA OKJE ERDMANN-BROWNING
18 and JACQUELINE BENITEZ, individually
19 and on behalf of all others similarly situated,

20 Plaintiffs,

21 v.

22 TOM VILSACK, Secretary, United States
23 Department of Agriculture, in his official
capacity; SHALANDA YOUNG, Director of
24 the United States Office of Management and
Budget, in her official capacity.

25 Defendants.

26 Case No.: 3:23-cv-04678

27 **DECLARATION OF DAVID A. SUPER
IN SUPPORT OF PLAINTIFFS' EX
PARTE APPLICATION FOR TRO
AND OSC RE: PRELIMINARY
INJUNCTION**

28 CLASS ACTION

Hearing Date: September 13, 2023
Time: TBD

Action Filed: September 12, 2023

DECLARATION OF DAVID A. SUPER

I, David A. Super, declare as follows:

1. I am Carmack Waterhouse Professor of Law and Economics at Georgetown University Law Center. My current resume is attached as **Exhibit 1**.

2. My area of expertise is the law and operations of the Food Stamp Program and its successor the Supplemental Nutrition Assistance Program (SNAP). I have studied this area for my entire professional career as a legal services lawyer, as a senior staff member of the Food Research and Action Center (FRAC), as General Counsel of the Center on Budget and Policy Priorities, and as an academic.

3. I have written and published numerous scholarly articles concerning the Food Stamp Program and SNAP, *FRAC's Guide to the Food Stamp Program*, and one of the two law school casebooks on Public Welfare Law, which emphasizes SNAP. I have trained program administrators and legal services lawyers on SNAP in more than forty states. I have consulted frequently with Members of Congress, senior officials at the United States Department of Agriculture (USDA) and the Executive Office of the President, and leading research organizations on the Food Stamp Program and SNAP, including serving as an outside reviewer on applications for research grants from USDA.

4. A large part of my work on the Food Stamp Program and SNAP has involved complicated quantitative analysis, relying on sources of data from USDA, other federal agencies, states, and private sources to understand the programs' operations, including spending and participation patterns and trends. I have frequently consulted with the Food Stamp Program and SNAP analysts at the Congressional Budget Office and the Office of Management and Budget (OMB) about cost estimates and projections concerning these programs.

5. For several decades, I have relied heavily on USDA's monthly KeyData Report for the most current and accurate data about participation and spending in federal food assistance programs, including the Food Stamp Program and SNAP. This data source is widely relied upon by food program experts seeking to understand recent trends in these

1 programs, as it is the most detailed and complete source of public information published by
 2 USDA.

3 6. The most recent available KeyData Report is for June 2023.¹ USDA will
 4 likely release the KeyData Report for July at the end of September or in early October.

5 7. According to the June 2023 KeyData Report for June 2023, as of June 30,
 6 2023, USDA had attributed \$89,297,763,200 in SNAP spending to Fiscal Year 2023,
 7 which started on October 1, 2022. This figure includes benefits, state administration,
 8 employment and training, nutrition education, and all other costs attributable to the SNAP
 9 appropriations account with the exception of the block grants for Puerto Rico, American
 10 Samoa, and the Commonwealth of the Northern Mariana Islands, the Emergency Food
 11 Assistance Program (TEFAP), and the Food Distribution Program on Indian Reservations
 12 (FDPIR).

13 8. SNAP spending was significantly higher for the first five months of Fiscal
 14 Year 2023 because of emergency allotments provided under the Families First
 15 Coronavirus Relief Act of 2020. The final month of the emergency allotments by law was
 16 February 2023, although table 2a in the KeyData Report shows that some emergency
 17 allotments were included in benefit costs for allotments to households in March 2023 and
 18 very small amounts in subsequent months. The KeyData Report shows that the end of
 19 emergency allotments reduced benefit costs by more than \$3 billion per month. From
 20 March 2023 through June 2023, average monthly total SNAP costs (excluding emergency
 21 allotments and state administration) were approximately \$7.595 billion in months without
 22 administrative reimbursements, as shown in the following table:

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 28 ¹ USDA Food and Nutrition Service June 2023 Key Data Report,
<https://www.fns.usda.gov/data/June-2023-keydata-report> (last visited September 12, 2023).

Month	All Costs Other Than State Administration (excluding Emergency Allotments)	State Administration (paid quarterly)	Total Cost (excluding Emergency Allotments)
March 2023	\$7,937,403,037	\$1,301,927,256	\$9,239,330,293
April 2023	\$7,433,084,978	\$0	\$7,433,084,978
May 2023	\$7,466,066,404	\$0	\$7,466,066,404
June 2023	\$7,545,016,009	\$1,290,281,244	\$8,835,297,253
Average	\$7,595,392,607	\$1,296,104,250	\$7,595,392,607 or \$8,891,496,857 with admin.

These figures do not include Puerto Rico and the Pacific territories, TEFAP, or FDPIR because those programs lie outside SNAP (even though they are paid from the SNAP appropriation). These figures do include about \$31 million per month in miscellaneous SNAP costs such as program research and pilot projects.

Historically, March 2023 SNAP participation (and previously, food stamp participation) has been among the highest of the year while September and October participation are among the lowest of the year. Although these seasonal patterns have become less reliable in recent years, the June 2023 KeyData Report does show that SNAP participation did decline modestly from March 2023 to June 2023. This supports the assumption that SNAP spending for the remaining three months of Fiscal Year 2023 will remain at or below the average level for March through June.

If SNAP spending has continued during July, August, and September at the March-June average level, total SNAP spending recorded for the twelve months corresponding to Fiscal Year 2023 will be \$113.4 billion. This reflects the \$89.3 billion already spent by June 2023 according to the KeyData Report for June 2023, three months of SNAP costs other than state administration at their March-June 2023 average of \$7.595 billion, and the September 2023 quarterly state administrative reimbursement at the March-June average of \$1.3 billion. Even if benefit costs for the July through September period jumped back up to the March 2023 level (and that the September reimbursement for states' administrative costs was also at the March level), total spending would increase from the

1 level estimated above only about one billion dollars.

2 11. The Fiscal Year 2023 SNAP Appropriation was \$153,863,723,000.² In
 3 addition to funding SNAP, this appropriation also funds block grants for nutrition assistance
 4 programs in Puerto Rico, American Samoa, and the Commonwealth of the Northern
 5 Mariana Islands. In Fiscal Year 2023, these block grants will receive approximately \$2.846
 6 billion in total according to Table 29a of the KeyData Report. The Fiscal Year 2023 SNAP
 7 Appropriation also supports the Emergency Food Assistance Program (TEFAP), which is
 8 likely to spend approximately \$1.23 billion for Fiscal Year 2023 based on Fiscal Year 2022
 9 spending shown on table 29c of the KeyData Report and the formula for inflation
 10 adjustments in section 27(a) of the Food and Nutrition Act. Finally, the Fiscal Year 2023
 11 SNAP Appropriation funds the Food Distribution Program on Indian Reservations
 12 (FDPIR), which appears likely to spend about \$115 million based on Table 29a of the
 13 KeyData Report. As reflected in the table below, adding the \$113.4 billion in SNAP costs
 14 calculated above to those costs from Puerto Rico and the Pacific territories (\$2.846 billion),
 15 TEFAP (\$1.23 billion), and FDPIR (\$115 million), USDA is likely to attribute
 16 approximately \$117.6 billion to the Fiscal Year 2023 SNAP Appropriation.

17 12. This will leave approximately \$36 billion unused from that appropriation.
 18 Under the terms of the appropriation, up to \$3 billion may be kept in a contingency reserve
 19 available through September 2025. Therefore, approximately \$33 billion remains in the
 20 Fiscal Year 2023 SNAP Appropriation that USDA does not appear to plan to spend.

21 13. SNAP benefit costs for October 2023 are likely to be approximately \$7.564
 22 billion, which is the average of benefit costs (excluding Emergency Allotments, which have
 23 been discontinued) from March 2023 through June 2023, according to the KeyData Report
 24 for June 2023. (Unlike the estimates above for July through September, this figure
 25 includes only benefit costs, and not all program expenditures. This is because quarterly
 26 reimbursements of state administrative costs are not due in October, and because this
 27 litigation concerns only SNAP benefits. Including other costs, which averaged only about

28 2 Consolidated Appropriations Act, 2023, Public Law No. 117-328, Div. A, tit. IV, 136 Stat
 4459, 4488-4489 (Dec. 29, 2022).

\$31 million per month during this period, would not meaningfully change the result.) The substantial majority of these will be attributable to households that were certified to receive October benefits before or during September 2023. These households' benefits ordinarily would be included in the issuance files state SNAP agencies will send their Electronic Benefit Transfer vendors in September 2023.

14. A minority of October 2023 benefits, likely well under \$2 billion, will be attributable to households not certified to receive benefits until after September 30, 2023. This amount is far less than the \$6 billion contingency reserve that will be available after October 1, 2023. This contingency reserve consists of \$3 billion that the Fiscal Year 2023 SNAP Appropriation provides shall not expire until September 30, 2025, and another \$3 billion that the Fiscal Year 2022 SNAP Appropriation provides shall not expire until September 30, 2024.³

15. These figures may be summarized as follows:

Fiscal Year 2023 Appropriation (Oct. 1, 2022 to Sept. 30, 2023)	\$153,863,723,000
Year-to-Date Prom-am SNAP Costs. as of June 30. 2023	-\$89,297,763,200
July 2023 (estimated based on March-June 2023 average of costs other than state administration)	-\$ 7,595,392,607
August 2023 (estimated based on March-June 2023 average of costs other than state administration)	-\$ 7,595,392,607
September 2023 (estimated based on March-June 2023 average of costs other than state administration plus March-June average state administration payment)	-\$ 8,891,496,857
Total SNAP Costs Attributed to Fiscal Year 2023 Appropriation	\$113,380,045.271
Block Irrants to Puerto Rico, American Samoa. and CNMI	-\$2,846,000,000
TEFAP	-\$1,230,000,000
FDPIR	-\$115,000,000
Total Program Costs Attributed to Fiscal Year 2023 Appropriation through September Benefits Issuance	- \$117,571,045.271
Remaining from Fiscal Year 2023 SNAP Appropriation	\$36,292,677,729
October 2023 Benefit Costs (estimated based on March- June 2023 average)	\$7,564,051,292
Amount that May be Added to Contingency Reserve	\$3,000,000.000
Amount from FY 2023 SNAP Appropriation Likely to be Unused	\$25.728.626.437

³ Consolidated Appropriations Act, 2022, Public Law No. 117- 103, Div. A, tit. IV, 136 Stat. 49, 78 (Mar. 15, 2022).

1 16. In conclusion, USDA has sufficient funds remaining in the Fiscal Year 2023
2 Appropriation to pay SNAP benefits for all eligible recipients in October 2023. The
3 calculations in the foregoing paragraphs will inevitably depart from the actual figures by
4 small amounts. That said, in no case will SNAP benefits for October 2023 cause program
5 costs to exceed the Fiscal Year 2023 SNAP Appropriation. Even if average monthly
6 participation inexplicably jumped by six million people - comparable to the increase from
7 February 2020 to June 2020 as the economy buckled under the coronavirus pandemic - the
8 Fiscal Year 2023 SNAP Appropriation would have much more than sufficient funds to cover
9 October 2023 benefits.

10 17. The "super-adequacy" of the Fiscal Year 2023 SNAP Appropriation is not
11 surprising. I have frequently spoken with USDA and OMB officials that advise Congress
12 on the level for the SNAP appropriation. They have consistently recommended
13 appropriations levels above their most pessimistic estimate of possible program costs. This
14 has been true in administrations of both political parties. Similarly, appropriators of both
15 political parties have expressed a strong desire to fund SNAP through annual
16 appropriations acts so that they can impose conditions to influence program policy. To
17 ensure that annual appropriations acts within their jurisdiction fully cover SNAP's needs,
18 they therefore have embraced these super-adequate annual SNAP appropriations. Super-
19 adequate SNAP appropriations do not increase the burden on the Treasury because the
20 Food and Nutrition Act prevents any excess from being spent to increase benefit levels or
21 expand eligibility. Any appropriated funds not needed for program costs never leave the
22 Treasury.

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1 I declare under penalty of perjury under the laws of the United States of America that
2 the foregoing is true and correct. I executed this declaration on September 12, 2023, in
3 Washington, D.C.

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7 DAVID A. SUPER
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EXHIBIT 1

DAVID A. SUPER

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EDUCATION

Harvard Law School, J.D. with honors, 1983; staff editor, comments editor, Harv. C.R.C.L. L. Rev.
Princeton University, A.B. in Politics *magna cum laude*, 1980; N.Y. Herald-Tribune Prize

TEACHING EXPERIENCE

Georgetown University Law Center, Washington, DC, 2003, 2008-present
Adjunct Professor of Law (2003, 2008, 2009, 2010); *Visiting Professor of Law* (2010-2011); *Professor of Law* (2011-2020); *Carmack Waterhouse Professor of Law and Economics* (2020-present)
Courses: Administrative Law; Bargain, Exchange and Liability; Contracts; Evidence; Federal Income Taxation; Legislation; Local Government Law; Property; Public Welfare Law; Torts
Committees: Academic Standards; Appointments; Diversity and Professionalism; Experiential Learning; Law Fellows and Teaching Careers; Public Interest (chair)
Award: Frank F. Flegal Excellence in Teaching Award (2018-19)

Columbia Law School, New York, NY, 2001-2008 *Visiting Lecturer in Law; Adjunct Prof. of Law*

Course: Public Benefits Law in Changing Times

Harvard Law School, Cambridge, MA, 2007-08 *Visiting Professor of Law*

Courses: Administrative Law; Legislation; Local Government Law

Howard University Law School, Washington, DC, 1999, 2001, and 2002 *Adjunct Professor of Law*

Course: Administrative Law

Princeton University, Princeton, NJ, 2000 and 2003 *Visiting Lecturer in Public and Int'l Affairs*

Courses: Task forces (seminars) in welfare policy (taught in Princeton's Woodrow Wilson School)

University of Maryland Law School, Baltimore, MD 2004-2011 *Professor of Law*

Courses: Administrative Law; Evidence; Legal Analysis, Writing, and Research; Professional Responsibility; Property; Public Welfare Law; Regulatory Theory; Statutory Interpretation; Torts

Committees: Appointments; Curriculum (chair); Loan Repayment Assistance Program Faculty Board; Promotions and Tenure (subcommittee chair)

Awards: Black Law Students' Association Professor of the Year (2010); Evening Division Students' Service Award (2010); Student Bar Association Outstanding Faculty Member of the Year (2010); Distinguished Research Professor (2010-11)

University of Pennsylvania Law School, Philadelphia, PA, 2003 *Lecturer in Law*

Course: American Public Benefits Law

Washington and Lee University Law School, Lexington, VA, 1999-2004
Adjunct Professor of Law (1999-2001, 2003); *Visiting Professor of Law* (Spring 2002 and 2004)
Courses: Advanced Problems in Admin. Law; Administrative Law (first-year course with writing and advocacy component); Federal Courts; Legislation; Local Government Law; Public Welfare Law

Yale Law School, New Haven, CT, 2002, 2004, 2006-07, 2016, 2021 Vis. Lect.; Vis. Prof. of Law Courses: Legislation; Local Government and Education Law; Procedure; Public Welfare Law

OTHER EMPLOYMENT

Center on Budget and Policy Priorities, Washington, DC, 1993-2004 *General Counsel*

National Health Law Program (NHeLP), Washington, DC, 1992-93 *Staff Attorney*

Food Research and Action Center (FRAC), Washington, DC, 1987-92
Legal Director, 1989-92; Staff Attorney and Policy Analyst, 1987-1989

Professor Laurence H. Tribe, Harvard Law School, Cambridge, MA, 1983 *Research Assistant*

SCHOLARLY ARTICLES

Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits, 113 YALE L.J. 815 (2004).

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¹⁰ *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544 (2005).

Are Rights Efficient? Challenging the Managerial Critique of Individual Rights, 93 CALIF. L. REV. 1051 (2005).

Privatization, Policy Paralysis, and the Poor, 96 CALIF. L. REV. 393 (2008).

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- The Modernization of American Public Law: Health Care Reform and Popular Constitutionalism*, 66 STAN. L. REV. 873 (2014).
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- A Hiatus in Soft-Power Administrative Law: The Case of Medicaid Eligibility Waivers*, 65 UCLA L. REV. 1590 (2018).
- Temporal Equal Protection*, 97 NO. CAR. L. REV. 59 (2019).
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- Acute Poverty: The Fatal Flaw in U.S. Anti-Poverty Law*, 9 U.C. IRVINE L. REV. 1273 (2020).
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BOOKS AND BOOK CHAPTERS

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Federal-State Budgetary Interactions, in FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY 366 (Elizabeth Garrett et al., eds., 2008).

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PUBLIC WELFARE LAW (Foundation Press 2017).

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OTHER PUBLICATIONS

Offsetting the Effects of Medical Expenses on Older Adults' Household Food Budgets: An Analysis of the Standard Medical Expense Deduction, 57 GERONTOLOGIST 359 (2017) (with Grace Bagwell-Adams, Jung Sun Lee and Vibha Bhargava).

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Protecting Households as States Stagger SNAP Issuance, 46 CLEARINGHOUSE REV. 272 (2012).

SNAP Eligibility for Low-Income College Students, 44 CLEARINGHOUSE REV. 508 (2011).

Congress Secures Private Right of Action for Low-Income Households Seeking Food Assistance, 44 CLEARINGHOUSE REV. 379 (2010).

The Mortgage Foreclosure Crisis: Seeking a Role for Equity, 42 CLEARINGHOUSE REV. 104 (2009).

Judicial Deference to Administrative Agencies and Its Limits, 40 CLEARINGHOUSE REV. 596 (2007) (with Graham G. Martin).

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1990 Farm Bill's Inaccessible-Resource Provision Applies to Vehicles, 26 CLEARINGHOUSE REV. 1343 (1993).

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Numerous columns in *The New York Times*, *The Los Angeles Times*, *The Washington Post*, *Newsday*, *The Philadelphia Inquirer*, *The Baltimore Sun*, *The Christian Science Monitor*, *The Hill*, *Bloomberg BNA*, *SCOTUS Blog*, and other publications on a wide range of topics including civil rights, Middle-

Eastern democracy, health care financing, taxation, the federal budget, constitutional conventions, natural resources, environmental protection, Ukraine, congressional procedure, elections, anti-poverty programs, technology, and other issues.

Regular poster on *Balkinization* public law blog.